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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 24.07.2020***
Pronounced on: 13.08.2020

\+ ARB. P. 632/2017

M/s JMC PROJECTS (INDIA) LIMITED ..... Petitioner
Through: Mr. Sachin Datta, Sr. Advocate
with Ms. Prity Sharma, Advocate.

versus

SOUTH DELHI MUNICIPAL CORPORATION ..... Respondent
Through: Mr. Sunil Goel, Standing Counsel.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

1. Present Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') to constitute an Arbitral Tribunal to adjudicate the disputes between the parties.

2. The genesis of the Petition is in a Contract entered into between the Petitioner and the Respondent on 24.09.2012 for carrying out the work of covering of Nallah from Pushp Vihar, Press Enclave Road, passing through Sheikh Sarai - Chirag Delhi - Panchsheel Enclave - GK-1 - Andrews Ganj upto Ring Road behind Police Station, Defence Colony (except the stretch of Nallah in GK-1 in a length of 1000 mtr.) under

JNNURM for providing Parking/Road cum Parking under the jurisdiction of Municipal Corporation of Delhi.

3. The effective date of start of the Contract was 08.09.2012 and the work was to be completed within 18 months i.e. upto 10.03.2014. Disputes having arisen between the parties regarding the completion of the work, the Petitioner requested the Respondent vide letter dated 06.03.2016 to consider the various claims raised by it vide letter dated 15.01.2016 and refer for adjudication by the Dispute Resolution Committee (hereinafter referred to as 'DRC'). The request was based on Clause 46 of Special Conditions of Contract (SCC) which provided for settlement of disputes by the DRC comprising of representative of the Petitioner and the Chief Engineer, MCD.

4. Prior thereto, the Petitioner had requested the Respondent vide letter dated 16.01.2016 to enter into a Supplementary Agreement for incorporating a separate Arbitration Clause.

5. The DRC was constituted by the Respondent vide letter dated 04.05.2016 and the Engineer-in-Charge nominated the Chief Engineer (Central) as Chairman of the DRC. Petitioner was asked to nominate its representative and vide letter dated 30.05.2016 Petitioner nominated its representative. Proceedings of the DRC were held on several dates to adjudicate the claims raised by the Petitioner and culminated into a decision dated 29.05.2017, whereby DRC directed the Respondent to pay amounts of Rs. 69,13,247/- and Rs. 11,15,841/-, along with the interest @ 7.5% p.a. w.e.f. 24.09.2015 to the Petitioner. The order was signed only by the Chief Engineer as the Petitioner's representative refused to sign the same.

6. Soon thereafter, Petitioner sent a notice dated 03.06.2017 to the Respondent invoking the Arbitration Agreement and sought appointment of an Arbitrator. Alleged failure on the part of the Respondent to appoint an Arbitrator led to filing of the present Petition under Section 11(6) of the Act and the Petitioner now seeks appointment of an Arbitrator on the premise that Clause 46 of SCC is an Arbitration Clause between the Parties.

Case of the Petitioner

7. Learned Senior Counsel for the Petitioner, Mr. Sachin Datta, contends that Clause 46 of SCC is an Arbitration Clause and the intention of the parties has always been to resolve their disputes through Arbitration. The essential features of an Arbitration Clause are that it is an Agreement in writing between the parties, all questions and disputes arising out of or relating to the Agreement are within the ambit of the Clause and the decision pursuant to such Proceedings is acceptable and binding on both parties.

8. Laying emphasis on the language of Clause 46 of SCC, it is argued that an identical Clause, with only a minor difference of the words 'one' and 'each', which are missing in the Clause 46 herein, has been held to be an Arbitration Clause by a Co-ordinate Bench in the case of ***AMR India Ltd. v. South Delhi Municipal Corporation, (2018) SCC OnLine Del 8243***. SDMC was a Respondent in the said case and the judgement has been accepted.

9. Further submission of the Petitioner is that minor difference of 'each' between Clause 46 and Clause 44, which was the subject matter of adjudication in ***AMR India (supra),*** makes no material

difference. Emphasis of the Respondent on the absence of the word 'each' to argue that there cannot be an Arbitral Tribunal with even number of Arbitrators in view of Section 10(1) of the Act, is without any merit. Supreme Court in the case of ***M.M.T.C. Limited v. Sterlite Industries (India) Limited, (1996) 6 SCC 716*** has held that merely because an Arbitration Agreement specifies an even number of Arbitrators cannot be a ground to render the Arbitration Agreement invalid. Reliance is placed on para 8 of the judgement which is as under:-

> *"8. Sub-section (3) of Section 7 requires an arbitration agreement to be in writing and sub-section (4) describes the kind of that writing. There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus, the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of machinery provision for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the New Act as contended by the learned Attorney General."*

10. To elaborate the argument, it is contended that in any case, the Clause by a bare reading does not envisage the Constitution of the DRC by an even number of members as the word 'presided' contemplates that the DRC shall consist of one representative of the Contractor, one of the Department and the Chief Engineer, being the third member would preside over. Even factually, it is submitted, that the DRC comprised of an odd number since the Petitioner was represented by its Deputy

Managing Director, while the SDMC was represented by an Executive Engineer and the Chief Engineer, MCD presided as the Chairman.

11. Learned Senior Counsel contends that the Supreme Court has in various judgements, while construing Clauses similar to Clause 46 herein as Arbitration Agreements referred the parties to Arbitration. Reliance is placed on the judgements of the Supreme Court in ***Smt. Rukmanibai Gupta v. Collector, Jabalpur and others (1980) 4 SCC 556***, ***Punjab State & others v. Dina Nath with Executive Engineer Anandpur Sahib Hydel Construction Division (2007) 5 SCC 28***, ***Bihar State Mineral Development Corporation and Another v. Encon Builders (I) (P) Ltd. (2003) 7 SCC 418*** in support of this contention. Reliance is also placed on the judgement of the High Court of Orissa in ***Keshab Charan Mohanty v. State of Odisha and Another, Arb. Pet. No. 11/2008***, decided on 05.11.2015, as well as the Karnataka High Court in ***Sri. B.R. Ganesh & Ors. v. The Commissioner, The Bruhat Bangalore Mahanagara Palike ILR 2015 KAR 2130***.

Case of the Respondent

12. Short reply has been filed by the Respondent in which a preliminary objection has been taken to the maintainability of the present Petition on the ground that there is no Arbitration Agreement between the parties and Clause 46 on which reliance is placed by the Petitioner cannot be construed as an Arbitration Clause.

13. Learned counsel for the Respondent on the basis of the stand in the reply argues that Clause 46 of the SCC provides for a two Member Committee, one being the Contractor's representative and the other being the Chief Engineer, who would preside the Committee. Section 10(1) of

the Act provides that the number of Arbitrators shall not be an even number and therefore the said Clause cannot be treated as an Arbitration Clause. It is further contended that an Arbitration Agreement is an Agreement between parties where there is a clear intent to resort to Arbitration as a mode of resolution of the disputes. The intention can be gathered from the words of the Agreement as well as from the correspondence exchanged, documents executed and the surrounding circumstances. In the present case, the conduct of the parties more particularly of the Petitioner clearly evidences that the parties proceeded on the basis that there was no Arbitration Agreement. In this context, reference is made to a letter dated 16.01.2016 written by the Petitioner to the Respondent requesting the Respondent to enter into a Supplementary Agreement for the purpose of incorporating a separate Arbitration Clause. The Petitioner, it is alleged, has conveniently not filed the said letter on record. Responding to the said letter on 19.02.2016, Respondent had categorically turned down the request of the Petitioner for entering into a separate Arbitration Agreement. On the request of the Petitioner, the case was processed for Constitution of DRC and the Petitioner never objected to its constitution and neither approached the Court at that stage under Section 11(6) of the Act. Rather, the Petitioner participated in the various hearings held on 11.07.2016, 16.09.2016, 30.12.2016 and 27.02.2017. The Petitioner extensively argued in support of its claims and once the proceedings resulted in an order, which was not to the liking of the Petitioner, its representative even refused to sign the order. Having taken a chance before the DRC, the Petitioner, a few days later sent a letter dated 03.06.2017 invoking Arbitration. The request of the Petitioner for

appointment of the Arbitrator was a misconceived action and a clever way to get out of the order passed by the DRC and re-agitate its claims. In any case, there being no Arbitration Clause, Respondent did not appoint an Arbitrator after receiving the said letter and the present petition is not maintainable.

14. The judgement in the case of ***AMR India (supra)*** is distinguished by arguing that the Clauses in the two cases are not identical. The absence of the words 'one' and 'each' in the present Clause 46 is significant and the requirements of Section 10(1) of the Act are not fulfilled. It is also submitted that in the said case Petition was filed under Section 9 of the Act and the Court had no occasion to go into the details regarding the requirements of the number of Arbitrators, under Section 10(1) of the Act.

15. With respect to the case of ***M.M.T.C. Limited (supra)*** it is argued that the said case pertains to an Agreement under the 1940 Act. There was no dispute in the said case regarding existence of the Arbitration Agreement and the dispute was regarding validity of the Arbitration Agreement as the Clause contemplated two Arbitrators and an Umpire. The question that arose before the Supreme Court was whether the Clause was in conflict with Section 10 (1) of the 1996 Act. In that context, where there was no dispute on the existence of the Arbitration Agreement, the Supreme Court held that 'even' number of Arbitrators cannot be a ground to render the Arbitration Agreement invalid under the 1996 Act. The position in the present case is totally different as in this case no Arbitration Agreement exists in the contract between the parties. For an Agreement to be an Arbitration Agreement, the mandate of Section 10(1)

of the Act is to have an odd number, which is clear from the use of the word 'shall' by the legislature.

16. Without prejudice to the above contentions Learned Counsel for the Respondent argues even if the Court was to hold that Clause 46 is an Arbitration Agreement, as is being argued by the Petitioner now, contrary to its earlier stand, the proceedings carried out by the DRC would then be Arbitration proceedings and the order passed shall have to be construed as an Arbitral Award. In that event, the present petition would in any case not be maintainable and the remedy of the Petitioner would be to challenge the Award under Section 34 of the Act. Once an Award has been passed in Arbitration Proceedings, it is not permissible for a party to invoke Section 11(6) of the Act and seek an appointment of an Arbitrator.

Rejoinder by the Petitioner

17. Learned Senior Counsel for the Petitioner argues that the Proceedings before the DRC cannot be treated as Arbitration Proceedings, as envisaged under the Act and its decision cannot be construed as an Arbitral Award. In support of the submission, it is argued that for initiation of Arbitral Proceedings there has to be a 'reference' to the Arbitral Tribunal. Reliance is placed on the judgement of the Supreme Court in ***State of Goa v. Praveen Enterprises, (2012) 12 SCC 581*** where the Supreme Court extensively dealt with what constitutes 'reference' to Arbitration and the manner in which the reference is to be made. Petitioner relies on paras 10, 11, 13 and 25 of the said judgement. It is argued that in the present case, there has been no reference to Arbitration either by the parties themselves or by reference of the disputes through

the intervention of the Court. It is for this reason that the Petitioner sent an Arbitration notice on 03.06.2017, soon after the order of the DRC.

18. Strength is sought to be taken, in support of this argument from the provision of Section 29A of the Act, which provides that the Award shall be made within a period of 12 months from the date the Arbitral Tribunal enters upon reference and the Arbitral Tribunal, as per Explanation to the Section, enters upon reference on the date the Arbitrator(s) receives notice of appointment.

19. It is argued that since there has been no appointment of an Arbitrator by either of the parties, there has been no 'entering upon reference' and the proceedings of DRC cannot be termed as Arbitral Proceedings. After the DRC was constituted, Petitioner realized, based on the judgements of the Supreme Court and this Court that Clause 46 of SCC was in the nature of an Arbitration Clause. Since no Arbitrator was appointed and hence no Arbitral Proceedings took place, request for appointment of the Arbitrator was sent to the Respondent.

20. It is also argued that none of the Members of the DRC made disclosure in terms of Section 12(1) of the Act which lends support to the argument that DRC was not an Arbitral Tribunal. The procedure envisaged under Section 19 the Act was never followed. No Statement of Claim or Statement of Defence, contemplated under Section 23(1) of the Act was filed. None of the claims of the Petitioner were discussed or pronounced upon.

21. Learned Senior Counsel contends that Section 31 of the Act stipulates the Form and Contents of the Arbitral Award and none of the ingredients of the Section can be found in the order of the DRC, apart

from the fact that it is not even signed by all the Members of the DRC. Great emphasis is laid on the observations of the Chairman of the DRC in the order passed by him, that the DRC was not acting as an Arbitral Tribunal and therefore at the highest, the proceedings can be construed to be in the nature of *amiable compositeur*.

22. Finally, Learned Senior Counsel, taking benefit of the stand of the Respondent during the course of hearing on 24.07.2020, that order of the DRC would not prevent the Petitioner from taking recourse to a Civil Suit, there being no Arbitration Agreement between the parties, had sought to argue that once the Respondent itself recognizes that the order of DRC is not an Arbitral Award, there is no reason why the Petition should not be allowed and the Arbitrator be appointed by this Court. Judgement of the Supreme Court in ***Perkins Eastman Architects DPC and Another v. HSCC (India) Ltd. (2019) SCC OnLine SC 1517***, is relied upon, whereby the Supreme Court has upheld the principle of Party Autonomy in appointment of the Arbitrator and held that unilateral appointment of Arbitrators is impermissible, to argue that the Arbitrator be appointed by the Court as the Respondent is disabled in law to make an appointment after the pronouncement of Supreme Court in the said case.

23. I have heard Learned Senior Counsel for the Petitioner and Learned Counsel for the Respondent.

24. At the outset, I must note that a peculiar though a very interesting issue has arisen in this case. The reason to say so is that on one hand the Petitioner seeks a declaration that Clause 46 of SCC be construed as an Arbitration Agreement between the parties and appoint an Arbitrator,

while on the other hand Respondent disputes that it is an Arbitration Clause and alternatively asserts that if it so construed, then the DRC has already adjudicated the claims and passed an order, which would resultantly be an Arbitral Award.

25. In so far as the scope of power of the Court under Section 11(6) of the Act is concerned, it is no longer *res integra* that the Court while deciding the petition can only examine the existence of the Arbitration Agreement between the parties. This position is clear from reading sub-Section 6(A) of Section 11 of the Act which is as under:-

> *"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*

26. This position of law has been repeatedly affirmed in various judgements and for the sake of prolixity, the Court only refers and relies on the recent judgement of the Supreme Court in ***M/s Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman (2019) 8 SCC 714***, relevant para of which is as under:-

> *"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow*

sense as has been laid down in the judgment in Duro Felguera, SA [Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59."

27. The first and foremost question that arises for consideration before this Court is whether Clause 46 of the SCC can be construed as an Arbitration Clause. This issue, in my view, does not require a comprehensive analysis and stands settled by the judgement of the Co-ordinate Bench in the case of ***AMR India (supra)***. The Court in the said case was analyzing Clause 44 of the GCC and the question posed was whether it constituted an Arbitration Agreement within the scope of Section 7 of the Act. To understand the issue it would be useful to extract Clause 46 in the present case as under:-

"46. SETTLEMENT OF DISPUTES

For settlement of disputes (if any), a Dispute Resolution Committee (DRC) consisting of representative of the contractor shall be formed and the same shall be presided by Chief Engineer, MCD. The decision of the DRC shall be binding on the both parties i.e. the contractor and the department".

28. To compare and contrast Clause 46 with Clause 44 in the case of ***AMR India (supra)*** it would be necessary to extract Clause 44, which is as follows:-

"44. SETTLEMENT OF DISPUTES

For settlement of disputes (if any), a Dispute Resolution Committee (DRC) consisting of one representative each of the contractor and the same shall be presided by Chief

Engineer, MCD. The decision of the DRC shall be binding on the both parties i.e. the contractor and the department."

29. In the context of Clause 44, the Co-ordinate Bench held as under:-

"9. It is clear from the aforesaid Clause that the parties had agreed that Dispute Resolution Committee (DRC) would be constituted by one representative of each of the contractor and that the same shall be presided by the Chief Engineer, MCD. The parties had unequivocally agreed that the decision of the DRC would be binding on both the parties.

xxx xxx xxx

12. In the present case, Clause 44 of the GCC clearly indicates the intention of the parties to settle the disputes by reference to the DRC and, as stated above, the parties have also agreed that the decision of the DRC would be binding on them. In this view, it is apparent that Clause 44 of the GCC qualifies all conditions, as explained by the Supreme Court, for being construed as an arbitration agreement.

xxx xxx xxx

14. The Supreme Court explained that "Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement."

xxx xxx xxx

17. In view of the above, this Court is of the view that Clause 44 of the GCC, as set out above, has to be construed as an arbitration agreement between the parties."

30. The Court in order to come to the conclusion that Clause 44 was an Arbitration Agreement relied on the judgement of the Supreme Court in ***K.K. Modi v. K.N. Modi (1998) 3 SCC 573***, relevant paras of which are as under:-

> *"17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:*
>
> *(1) the arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,*
>
> *(2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,*
>
> *(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,*
>
> *(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,*
>
> *(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,*
>
> *(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.*
>
> *xxx xxx xxx*
>
> *19. At the risk of repetition we may also say before parting with this judgment that Clause 4 of the Work Order speaks*

for a dispute between the parties. It also speaks of a dispute and all such disputes between the parties to the Work Order shall be decided by the Superintending Engineer, Anandpur Sahib Hydel Circle No. 1. Obviously, such decision can be reached by the Superintending Engineer, Anandpur Sahib Hydel Circle No. 1 only when it is referred to him by either party for decision. The reference is also implied. As the Superintending Engineer will decide the matter on reference, there cannot be any doubt that he has to act judicially and decide the dispute after hearing both the parties and permitting them to state their claim by adducing materials in support. In Clause 4 of the Work Order it is also provided as noted herein earlier that the decision of the Superintending Engineer shall be final and such agreement was binding between the parties and decision shall also bind both the parties. Therefore, the result would be that the decision of the Superintending Engineer would be finally binding on the parties. Accordingly, in our view, as discussed herein above that although the expression "award" or "arbitration" does not appear in Clause 4 of the Work Order even then such expression as it stands in Clause 4 of the Work Order embodies an arbitration clause which can be enforced.

20. For the reasons aforesaid, we are of the view that Clause 4 of the Work Order can safely be interpreted to be an arbitration agreement even though the term "arbitration" is not expressly mentioned in the agreement. In view of our discussions made herein earlier, we therefore conclude that Clause 4 of the Work Order constitutes an arbitration agreement and if any dispute arises, such dispute shall be referred to the Superintending Engineer for decision which shall be binding on the parties."

31. The Court also relied on the following judgements of the Supreme Court :-

a. In ***Smt. Rukmanibai Gupta v. Collector, Jabalpur and others (1980) 4 SCC 556*** the Clause was as under:-

> *"Clause 15. Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder the matter in difference shall be decided by the lessor whose decision shall be final."*

The Court held as under:-

> *"6. Clause 15 provides that any doubt, difference or dispute, arising after the execution of the lease deed touching the construction of the terms of the lease deed or anything therein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable thereunder, the matter in difference shall be decided by the lessor whose decision shall be final. The reference has to be made to the lessor and the lessor is the Governor. His decision is declared final by the terms of the contract. His decision has to be in respect of a dispute or difference that may arise either touching the construction of the terms of the lease deed or disputes or differences arising out of the working or non-working of the lease or any dispute about the payment of renter royalty payable under the lease deed. Therefore, Clause15 read as a whole provides for referring future disputes to the arbitration of the Governor.*

Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement."

b. In ***Punjab State & others v. Dina Nath with Executive Engineer*** Anandpur ***Sahib Hydel Construction Division (2007) 5 SCC 28*** the Clause was as under:-

"Clause 4. Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel Circle No. 1 Chandigarh for orders and his decision will be final and acceptable/binding on both the parties."

The Court held as under:-

"10. It is true that in the aforesaid Clause 4 of the Work order the words "arbitration" and "arbitrator" are not indicated; but in our view, omission to mention the words "arbitration" and "arbitrator" as noted herein earlier cannot be a ground to hold that the said clause was not an arbitration agreement within the meaning of Section 2(a) of the Act. <u>The essential requirements as pointed out herein earlier are that the parties have intended to make a reference to an arbitration and treat the decision of the arbitrator as final</u>. As the conditions to constitute an 'arbitration agreement' have been satisfied, we hold that Clause 4 of the Work Order must be construed to be an arbitration agreement and dispute raised by the parties must be referred to the arbitrator."

c. In ***Sri. B.R. Ganesh & Ors. v. The Commissioner, The Bruhat Bangalore*** Mahanagara ***Palike ILR 2015 KAR 2130*** the Clause was as under:-

> *"Clause 10: Dispute Resolution*
> *Save where expressly stated to the contrary in this agreement, any dispute, difference or controversy of whatever nature between the parties, howsoever arising under, out of or in relation to this agreement, shall in the first instance be attempted to be resolved amicably by meetings between the parties.*
>
> *Any dispute, which is not amicably resolved by the parties, shall be finally settled by the Commissioner, BMP, whose decision shall be final and binding on both the parties.*
>
> *Pending submission of and/or decision on a dispute, the parties shall continue to perform their respective obligation under this agreement without prejudice to a final adjustment in accordance with the decision of the Commissioner, BMP."*

The Court held as under:-

> *"26. .... the irresistible conclusion which will have to be drawn is to hold that clause 10 of subject agreement would indicate that all necessary ingredients to constitute a valid arbitration agreement is present namely:*
>
> *(i) Subject Agreement dated 15.03.2007 is in writing;*
> *(ii) Both parties have agreed to refer any dispute, difference or controversy of whatever nature arising out of or in relation*

to the subject agreement to be resolved finally by the Commissioner, BMP if it is not resolved amicably in the meeting;

(iii) Commissioner, BMP has been empowered to adjudicate the dispute between the parties; and

(iv) Both parties have agreed the decision of Commissioner, BMP would be final and binding on them."

d. In ***Keshab Charan Mohanty v. State of Odisha and Another, Arb. Pet. No. 11/2008***, decided on 05.11.2015, the Clause was as under:-

"10. SETTLEMENT OF DISPUTE;
If the contractor considers any work demanded of him to be outside the requirements of the contract or considers any drawing record or ruling of the Engineer-in-charge, on any matter in connection with or arising out of the contract or carrying out of work to be unacceptable, he shall promptly ask the Engineer-in-charge in writing for written instruction or decision. There upon the Engineer-in-charge shall give his written instructions or decision within a period of thirty days of such request. Upon receipt of the written instruction or decision, the Contractor shall promptly proceed without delays to comply with such instruction or decision. If the Engineer-in-charge fails to give his instructions or decision in writing within a period of thirty days after being requested or if the contractor is dissatisfied with the instruction or decision of the Engineer-in-charge the contractor may within thirty days after receiving instruction or decision of the Engineer-in-charge will approach to the higher authority who shall afford an opportunity to the contractor to be heard and to offer evidence in support of his appeal. The

Authority shall give his decision within a period of thirty days after the contractor has given the said evidence in support of his appeal, which shall be binding upon the contractor."

The Court held as under:-

"22. .....Clause-10 of the Agreement, as detailed above, clearly provides that if the contractor is dissatisfied with the instructions or decisions of the engineer-in-charge, the contractor may within 30 days after receiving such instructions or decisions of the Engineer-in-charge, approach an opportunity to the contractor to be heard and offer evidence in support of his appeal. The high authority shall give its decisions within a period of 30 days after the contractor has given the said evidence in respect of his appeal, which shall be binding upon the contractor.

23. Keeping in view the essential ingredients which would constitute an arbitration agreement, as has been laid down by the Supreme Court in the decisions referred to above, the conclusion is irresistible that the aforesaid provisions of Clause-10 of the Agreement, which provides for settlement of dispute, is an arbitration agreement."

e. In ***Bihar State Mineral Development Corporation and Another v. Encon Builders (I) (P) Ltd. (2003) 7 SCC 418*** the Clause was as under:-

"Clause 60. In case any dispute arising out of the agreement, the matter shall be referred to the Managing Director, Bihar State Mineral Development Corporation Limited, Ranchi, whose decision shall be final and binding."

The Court held as under:-

> *"13. The essential elements of an arbitration agreement are as follows:*
>
> *(1) There must be a present or a future difference in connection with some contemplated affair.*
> *(2) There must be the intention of the parties to settle such difference by a private tribunal.*
> *(3) The parties must agree in writing to be bound by the decision of such tribunal.*
> *(4) The parties must be ad idem.*
>
> *14. There is no dispute with regard to the proposition that for the purpose of construing an arbitration agreement, the term 'arbitration' is not required to be specifically mentioned therein. The High Court, however, proceeded on the basis that having regard to the facts and circumstances of this case, the arbitration agreement could have been given effect to. We may, therefore, proceed on the basis that Clause 60 of the Contract constitutes an arbitration agreement."*

f. In ***Dewan Chand v. The State of J & K AIR 1961 J & K 58 (VOL. 48, C.24)*** the Clause was as under:-

> *"For any dispute between the contractor and the Department the decision of the Chief Engineer PWD Jammu and Kashmir, will be final and binding upon the contractor."*

The Court held as under:-

> *"8. The clause of the agreement quoted above, clearly indicates that the parties have agreed that any dispute between the contractor and the department i.e. the plaintiff and the defendant should be referred to the Chief Engineer and that his decision shall be final and binding on the parties. It is true that the word "reference" is not used in this clause nor it has been mentioned that the Chief Engineer should be the arbitrator, but looking to the substance of the clause, there can be no doubt, that the parties agreed that any dispute between them should be settled by the Chief Engineer.*
>
> *9. ……Whenever, there is an arbitration clause the court should look to the substance rather than to the form of it and the mere fact that words like "reference" or "arbitrator" do not find place in the said agreement does not show that the agreement is not an arbitration agreement within the meaning at Section 2 (a) of the Arbitration Act."*

32. From the conspectus of the several judgements referred to above, this Court is of the view that Clause 46 of the SCC has to be construed as an Arbitration Agreement between the parties. Succinctly put the Clause meets all the four ingredients/essentials of an Arbitration Agreement, highlighted by the Supreme Court in the case of ***Bihar State Mineral Development Corporation and Another v. Encon Builders (I) (P) Ltd. (2003) 7 SCC 418***.

33. Once this Court has come to a finding that there exists an Arbitration Agreement between the parties, the opposition of the

Respondent premised on Section 10(1) of the Act cannot be sustained, in the view of the judgement of the Supreme Court in ***M.M.T.C. Limited (supra)*** where the Court held that validity of an Arbitration Agreement does not depend on the number of Arbitrators and the Arbitration Agreement specifying an even number of Arbitrators cannot be a ground to render the Agreement invalid under the 1996 Act. Para 8 of the said judgement has already been extracted in the earlier part of the judgement.

34. Relevant would it be to refer to Section 10(2) of the Act in this context. Plain reading of the provision, in my view, enables appointment of a Sole Arbitrator where the Parties fail to provide an odd number of Arbitrators under Section 10(1). Thus it can hardly be argued by the Respondent that only because Clause 46 contemplates appointment of a 2 member DRC, the Clause cannot be construed as an Arbitration Agreement, when it qualifies to be so, on the touchstone of all other applicable parameters.

35. I am fortified in my view by a judgement of Andhra Pradesh High Court in the case of ***Sri. Venkateswara Construction Company v. Union of India Secunderabad, 2001 SCC OnLine AP 116***, where the Court has held as under:-

> *"26. The question that still remains for consideration is - how to constitute the Arbitral Tribunal? Is it by appointing a sole Arbitrator or two Arbitrators as agreed between the parties?*
>
> *27. The answer to the said question is to be found in Section 10 of the New Act, which is as under:*
>
> *"Section 10 Number of Arbitrators: -*

1. The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

2. Failing the determination referred to in sub-section (1), the arbitral Tribunal shall consist of a sole Arbitrator".

28. A close reading of the aforesaid provision clearly shows that the parties are at liberty to determine the number of Arbitrators, but such number shall not be an even number. Sub-section (2) further provides that if the parties fail to provide for an odd number of Arbitrators, the arbitral Tribunal shall be constituted by a sole Arbitrator.

29. In this case, as already noted, sub-clause (3)(a)(ii) and (3)(b) of Clause 64 of the General Conditions of the Contract provides for arbitration by two Arbitrators i.e., even number of Arbitrators. Therefore, the arbitral Tribunal in this case shall consist of a sole Arbitrator in view of the aforesaid mandatory provision contained in subsection (2) of Section 10 of the New Act.

30. For all the aforementioned reasons, I have no hesitation to hold that an independent and impartial Arbitrator has to be appointed as a sole Arbitrator in this case."

36. A Co-ordinate Bench of this Court in the case of ***Rapti Contractors v. Reliance Energy Ltd., 2009 SCC OnLine Del 275,*** relying on the view taken by the Single Judge of the Andhra Pradesh High Court in ***Sri. Venkateswara Construction (supra)*** and of this Court in ***Marine Container Services (South) Pvt. Ltd. v. Atma Steels Ltd., 2000 SCC OnLine Del 907*** & ***Wipro Finance Ltd v. Sandplast India Ltd, 2006 (3) Raj. 524 (Delhi)***, held as under:-

"15. Regarding the appointment of even number of arbitrators, the learned counsel for the petitioner has relied on Deepashree v. Sultan Chand & Sons, 2008 (4) Arb.LR 94 (Delhi). In Deepashree (Supra) the arbitration agreement contemplated appointment of two arbitrators, one each to be appointed by the parties. On disputes having arisen, an arbitrator was appointed by one of the parties and the other party was asked to give consent to the appointment of that arbitrator as the sole arbitrator. The opposite party had declined to concur with the appointment of the nominated arbitrator as the sole arbitrator and had nominated another arbitrator as per the terms of the agreement. Thereafter, an application under Section 11 was filed by one of the parties. The learned Single Judge relying on a judgment of the Andhra Pradesh High Court in Sri Venkateswara Construction Company v. Union of India, AIR 2001 A.P 284 where an agreement for arbitration by two arbitrators was construed as an agreement for reference to a sole arbitrator, and relying on two judgments of this Court, Wipro Finance Ltd v. Sandplast India Ltd, 2006 (3) Raj. 524 (Delh) and Marine Container Services (South) Pvt Ltd v. Atma Stee ls Ltd, 2001 (1) Arb.L.R. 341 (Delhi) where sole arbitrators were appointed even though the arbitration agreements were for the appointment of two arbitrators, had held that an agreement for appointment of two arbitrators is not an agreement within the meaning of Section 10(1) of the Act and consequently Section 10(2) comes into play and the Arbitral Tribunal is to consist of a sole arbitrator.

16. Section 10(1) of the Arbitration & Conciliation Act, 1996 provides that the parties are free to determine the number of arbitrators provided that such number shall not be an even number. Section 10(2) of the said Act, however, provides that failing the determination referred to in sub-Section (1) the arbitral tribunal shall consist of a sole arbitrator. The precedents referred to hereinabove had also held that an arbitration agreement which provides for an even number of arbitrators will not be invalid on that count

only and it was held that in those circumstances the arbitration agreement is to be deemed to be for reference to a sole arbitrator. A similar view was also taken in North East Securities Ltd v. Sri Nageshwara Chemicals and Drugs Pvt Ltd, 2001 (1) Arb.L.R. 70 (A.P). In view of the precedents discussed above it cannot be held that the arbitration agreement is void solely for the reason that it contemplated arbitration by even number of arbitrators. Section 10(2) of the Arbitration and Conciliation Act, 1996 shall be applicable in the circumstances and the arbitral tribunal is to consist of a sole arbitrator. The petitioner had appointed an arbitrator and asked the respondents to appoint his arbitrator which the respondents failed to appoint within 30 days or before filing of the present petition. Since even numbers of arbitrators are not to be appointed, therefore, it will be just and appropriate to appoint a sole arbitrator. The learned counsel for the petitioner also has no objection in case a sole arbitrator is appointed in place of the arbitrator nominated by the petitioner.

xxx *xxx* *xxx*

22. For the foregoing reasons, the petition is allowed....”

37. The next and the most crucial question that now arises is whether the Court can be called upon to appoint an Arbitrator in the present Petition filed by the Petitioner invoking Section 11(6) of the Act. This dilemma has arisen on account of the fact that on the request of the Petitioner DRC was constituted and proceedings were held wherein the claims of the Petitioner were considered. Proceedings ended in an order allowing the claims, in part. If these are to be treated as Arbitral proceedings and the order as Arbitral Award, then the present petition cannot be allowed. The nature of these proceedings would thus determine

whether this Court can appoint an Arbitrator or the remedy of the Petitioner lies in challenging the Award in appropriate proceedings.

38. Section 11(6) of the Arbitration Act reads as under:-

> *"Section 11 (6)-*
>
> *(6) Where, under an appointment procedure agreed upon by the parties, -*
>
> *(a) a party fails to act as required under that procedure; or*
>
> *(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*
>
> *(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,*
>
> *a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment".*

39. Parties are *ad idem* that DRC proceedings were never prosecuted or defended as Arbitral Proceedings and even the members of DRC were conscious of this fact, which is evident from the observation of the Presiding member in the order, as under:-

> *"Hence being the chairman of the DRC, I am considered opinion that there is no Arbitration clause in the contract."*

40. Needless to state that because the proceedings were on the above assumption, procedure of conduct of Arbitral Proceedings, as prescribed under the Act, was not followed. As rightly argued by Learned Senior

Counsel for the Petitioner there was no Reference and no Declaration was given under Section 12(5) of the Act. Claims and Counter claims were not filed and parties had no opportunity to lead evidence. Perusal of the order passed by DRC reveals that it was merely an internal mechanism with no semblance to the nature of proceedings that are held during arbitration. In my view, therefore, having no trappings of Arbitral proceedings, DRC proceedings cannot result into an Arbitral Award as provided under Section 31 of the Act. Court cannot also lose sight of the fact that after the 2015 Amendments to the Act and recent judgements of the Supreme Court certain procedural safeguards have been introduced, both for initiation and conduct of Arbitral Proceedings.

41. Thus the DRC proceedings not being Arbitral Proceedings and held on an erroneous presumption that there was no Arbitration Agreement between the parties cannot come in the way of appointment of an Arbitrator by this Court. Once even the Respondent agrees that there have been no arbitral proceedings between the parties and the Court is holding that there is an Arbitration Agreement between the parties, there is no justifiable reason to deprive the Petitioner to take resort to Arbitration.

42. The last conundrum that needs to be resolved is the appointment of the Arbitrator. Provisions of Section 10(2) of the Act being applicable in the present case shall entail appointment of a Sole Arbitrator. Supreme Court in ***Perkins (supra)*** has held that unilateral appointments is impermissible and thus the petition deserves to be allowed by appointing a Sole Arbitrator to adjudicate the disputes between the parties.

43. Accordingly, Dr. Justice A.K. Sikri, former Judge of Supreme Court is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

44. The address and mobile number of the Learned Arbitrator is as under:

Dr. Justice A.K. Sikri,
Former Judge, Supreme Court of India,
144, 1st Floor, Sunder Nagar,
New Delhi – 110003
Mobile: 98180003000

45. Learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

46. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

47. Petition is allowed in the above terms with no order as to costs.

JYOTI SINGH, J

AUGUST 13th , 2020
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